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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-279

CHARLES J. PILUSO, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No.

CHARLES J. PILUSO, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner herein prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on June 28, 1978. The petition for rehearing was denied on July 21, 1978.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and a copy is attached to this petition (Pet. App. 1a-4a). The order denying the petition for rehearing is attached (Pet. App. 5a-6a).

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 28, 1978. The jurisdiction of this court is predicated on Title 28 USC, Section 1254(1).

QUESTIONS PRESENTED

I. Do not the conflicting opinions of the Second Circuit in *United States* v. *Brecht,* 540 F.2d 45 (1976) and the Fourth Circuit in *United States* v. *Piluso,* 511 F.2d 953 (1975) establish, regardless of which decision is correct, that the Travel Act, as judicially applied to the Petitioner's actions in 1970 and 1971, was unconstitutionally vague with respect to notice under this court's decisions in *Marks* v. *United States,* 430 U.S. 188 (1977); *Bouie* v. *City of Columbia,* 378 U.S. 347 and *McBoyle* v. *United States,* 283 U.S. 25?

II. Should not this court resolve once and for all the continuing conflict between the Second Circuit, the Fourth Circuit, and various district courts over the application of an important federal criminal statute such as the Travel Act, Title 18, Section 1952, *United States* v. *Brecht,* supra, and *United States* v. *Piluso,* supra, which is resulting in unequal administration of the criminal law in the enforcement of the Travel Act in various circuits and where prosecution under the Act is now being determined by the jurisdiction in which the particular defendant may reside?

STATEMENT OF THE CASE

The Petitioner, an attorney at law, was convicted in 1974 on one count for conspiracy to violate Title 18, Section 1952 USC, and on two substantive counts which charged violations of Title 18, Section 1952 USC. The

underlying unlawful activity which was used as the predicate for invoking the jurisdiction of the Travel Act was Section 180 of the New York Penal Code, a misdemeanor known as commercial bribery, and a conflict of interest statute, Title 18, Section 215 of the United States Code, also a misdemeanor. The Petitioner moved to dismiss the indictment, asserting that the indictment failed to charge an offense under the Travel Act. The Petitioner was convicted and appealed his conviction to the United States Court of Appeals for the Fourth Circuit, which affirmed the conviction, *United States* v. *Piluso,* 511 F.2d 1953, *cert. denied.* 423 U.S. 874 (1975), with Mr. Justice Douglas noting that he would grant certiorari. The Petitioner was incarcerated and served the sentence imposed upon him by the district court. Thereafter, the United States Court of Appeals for the Second Circuit rendered an opinion in the case of *United States* v. *Brecht,* 540 F.2d 45 (2d Cir. 1976), in which the Second Circuit disagreed with the Fourth Circuit and specifically held that the commercial bribery statute of New York, Section 180 of the New York Penal Code, could not constitute the underlying unlawful activity upon which a charge could be based under the Travel Act, Title 18, Section 1952 of the United States Code. Thereafter, the Petitioner filed a motion in the United States District Court, pursuant to Title 28, Section 2255 USC, and asked the district court to set aside his conviction as being obtained in violation of due process of law. The Petitioner urged that regardless of which circuit court of appeals was correct in its construction of the Travel Act, the conflict in the circuits as to whether the Petitioner's acts in fact violated the Travel Act established that the Travel Act was unconstitutionally vague with respect to the Petitioner's activities in 1970 and

1971. The Petitioner also urged that the ruling of the Second Circuit in *United States* v. *Brecht,* supra, was the correct interpretation of this court's ruling in *United States* v. *Nardello,* 393 U.S. 286, and that as such no valid indictment had been filed in the federal court in Alexandria charging a federal offense under the Travel Act such that the trial court had no jurisdiction to proceed to judgment. The district court denied the Petitioner's motion to set aside the conviction and the Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. The Petitioner's appeal was consolidated with the companion motion and appeal of Louis J. Pomponio, Jr. The United States Court of Appeals for the Fourth Circuit rendered an opinion on June 28, 1978, (Pet. App. 1a-5a) which rejected the Petitioner's contentions and affirmed the action of the district court. The Court of Appeals for the Fourth Circuit noted in its opinion the existence of a conflict between the Second Circuit and its own opinion but tok notice of the fact that the Supreme Court, on two occasions, had denied certiorari, once before the conflict occurred and once after the conflict occurred. See opinions pages 3 and 4 (Pet. App. 3a-4a). The Petitioner also asked the United States Court of Appeals for the Fourth Circuit to certify two questions the to Supreme Court of the United States for resolution. The two questions were:

1. Does an indictment charge a valid federal offense under the Travel Act, Title 18, Section 1952, when the unlawful activity upon which the jurisdiction is predicated is commercial bribery under Section 180 of the New York Penal Code?
2. Does an indictment charge a valid federal offense under the Travel Act, Title 18, Section 1952, when the unlawful activity upon which the jurisdiction is predicated is a violation of Title 18, Section 215 of the United States Code?

The United States Court of Appeals for the Fourth Circuit denied the request for certification of the two questions and again took note of the two prior denials of certiorari by this court of the conflicting opinions. The petition for rehearing was denied on July 21, 1978. The petition for certiorari follows.

STATUTES AND RULES INVOLVED

Title 18, United States Code

§ 215. Receipt of commissions or gifts for procuring loans.

Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

§ 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, § 1952, U.S.C. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promote, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

New York Penal Law

§ 180 Commercial bribing.

A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employee or principal with intent to influence his conduct in relation to his employee's or principal's affairs.

Commercial Bribing is Class B misdemeanor.

§ 200.0 Bribery

A person is guilty of bribery when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

Bribery is a class D felony.

* * *

§ 70.15 Sentences of imprisonment for misdemeanors and violation

2. Class B misdemeanor. A sentence of imprisonment for a class B misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed three months.

§ 70.00 Indeterminate sentence of imprisonment for felony

* * *

2. Maximum term of sentence. The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:

* * *

(d) For a class D felony, the term shall be fixed by the court, and shall not exceed seven years. . . .

* * * * *

REASONS WHY THE WRIT SHOULD BE GRANTED

I

Regardless Of Whether The Second Circuit In *United States* v. *Brecht*, 540 F.2d 45 (2d Circuit 1976), Or The United States Court Of Appeals For The Fourth Circuit In *United States* v. *Piluso*, 511 F.2d 953, Is Correct As To Whether The Petitioner's Conduct In 1970 And 1971 Charged A Valid Offense Under The Travel Act, The Petitioner's Conviction Lacks Due Process Of Law Under *Marks* v. *United States*, 430 U.S. 188 (1977), *Bouie* v. *City of Columbia*, 378 U.S. 347, And *McBoyle* v. *United States*, 283 U.S. 25, 51 S.Ct. 340, And This Expansive Judicial Interpretation Of The Act Is Equivalent To An Ex Post Facto Legislation And Constitutes A Violation Of Due Process Of Law Under The Fifth Amendment. *Douglas* v. *Buder*, 412 U.S. 430.

In the opinion of the United States Court of Appeals for the Fourth Circuit, at page 4, the Court stated:

> In their post-conviction motions the appellants primarily contend that the conflict between us and the Second Circuit, together with the application of our construction of the statute in 1975 to conduct which occurred in 1970 and 1971 deprive them of due process under Marks v. United States. 430 U.S. 188 (1977) and Bouie v. City of Columbia, 378 U.S. 347 (1964). In our opinion, however, the mere existence of a conflict between two circuits with respect to the construction of a criminal statute is insufficient to bring these cases within the rationale of Marks and Bouie.

We agree with the contention of the Court of the Appeals for the Fourth Circuit that a mere conflict between the circuits on the construction of a statute does not in and of itself raise the principles governed by *Marks* v. *United States,* supra, and *Bouie* v. *City of Columbia, supra.* We do suggest, however, that when the Petitioner's conduct in 1970 and 1971 cannot

reasonably be interpreted or understood by a reading of the statute to violate its prohibitions, the Petitioner has been denied the requisite notice that his acts are in contravention of the statute. As such, the due process violation that follows arises not from the vague language of the statute itself but, as in *Lanzetta* v. *New Jersey,* 306 U.S. 451, and *Connally* v. *General Construction Company,* 269 U.S. 385, from the unforeseen and retroactive expansion of a statute due to judicial construction.

At the time of the Petitioner's acts in 1970 and 1971 there were no decisions which remotely suggested that the misdemeanor of commercial bribery, enacted in only a handful of states, and the conflict of interest statute, a misdemeanor, Title 18, Section 215, could constitute the unlawful activity necessary to invoke the jurisdiction of the Travel Act, Title 18, Section 1952. In *Marks* v. *United States,* supra, the Supreme Court, quoting from its earlier decision in *Bouie* v. *City of Columbia,* supra, stated:

> In Bouie v. City of Columbia, 378 US 347, 84 S.Ct. 1697, a case involving the cognate provision of the Fourteenth Amendment, the Court reversed trespass convictions, finding that they rested on an unexpected construction of the state trespass statute by the State Supreme Court:
>
> > [A]n unforeseeable judicial enlargement of *a criminal statute applied retroactively operates precisely like an ex post facto law such as Article 1, Section 10 of the Constitution forbids* * * *. If a state legislature is barred by the ex post facto clause from passing such a law, it must follow that a state supreme court is barred by the due process clause from achieving precisely the same result by judicial construction.

The Court then went on to say:

> Similarly, in Rabe v. Washington, 405 U.S. 313 93 S.Ct. 933, we *reversed the conviction under a state obscenity law because it rested on an unforeseeable judicial construction of the statute.* We stressed that reversal was mandated because affected citizens lacked notice that the statute would be thus applied.

The Fifth and Fourteenth Amendments prescribe the enforcement of criminal statutes which are vague and overbroad. See generally Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court,* 109 University of Pennsylvania Law Review 67 (1960). Two elementary principles integral to this sense of due process are: (1) that the law be plain and intelligible so that the ordinary citizen, and in particular those who may stray from the law, can be charged with knowledge of the criminal consequences of certain specified acts; and (2) that the criminal justice system operate so that there is even-handed application of sanctions for acts specified by the legislature to be crimes. See *United States* v. *L. Cohen Grocery Company,* 255 U.S. 81; *Connally* v. *General Construction Company,* 267 U.S. 385; *McBoyle* v. *United States,* 283 U.S. 25; *Lanzetta* v. *New Jersey,* 306 U.S. 451; *United States* v. *Reese,* 92 U.S. 214; and *Papachristou* v. *City of Jacksonville,* 405 U.S. 156.

The Petitioner stands convicted because of an expansive construction of the Travel Act by the United States Court of Appeals for the Fourth Circuit in 1975 for acts committed by the Petitioner in 1970 and 1971. The Second Circuit's ruling in *United States* v. *Brecht,* supra, rendered in 1976, which is directly contrary to the decisions of the Fourth Circuit, would re-

quire dismissal of the indictment, and this divergence of opinion as to whether a federal crime has been charged has extended to the district judges of the Southern District of New York and the Eastern District of Virginia. See *United States* v. *Needleman,* 356 F.Supp. 979; *United States* v. *Brecht,* supra, and *United States* v. *Piluso,* supra. Mr. Justice Holmes, in *United States* v. *McBoyle,* supra, stated:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, *it is reasonable that a fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed. To make the warning fair, so fare as possible the line should be clear.* When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used.

In a recent concurring opinion Judge Aldisert of the Third Circuit referred to this court's ruling in *McBoyle* v. *United States,* supra, in dealing with Title 18, Sections 1961 :5 and 1961(1)(a), and stated:

> Although proper judicial interpretation of any federal statute is always important, proper judicial interpretation of a criminal statute is critical. *The maxim nullum crimen sine lege, nulla poena sine lege reminds us that the courts may not punish conduct as criminal unless that conduct has transgressed the clear, plain, or fair meaning of the defined offense.* In the federal courts, this means a congressionally defined offense, because there is no federal common law of crimes.

> Nevertheless, an interesting notion is volunteered here that bribery activities which occurred in 1972 and 1974 can still fall within the congressional definition of racketeering in 1977, by declaring judicially that "the words 'chargeable under State law' in § 1961(1)(A) mean 'chargeable under State law at the time the offense was committed.' " (At 1067). *This is not statutory interpretation; it is statutory construction in the pristine fabricating sense. It is a judicial, not legislative, definition of criminal activity, a genre of statutory interpretation outlawed by a host of Supreme Court decisions.* See, e.g. Huddleston v. United States 415 U.S. 814, 831, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974).

In another portion of the concurring opinion, quoting from Mr. Justice Marshall in *United States* v. *Bass,* 404 U.S. 336, 92 S.Ct. 515 the court, stated:

> [A]s we have recently reaffirmed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." . . . In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C.I.T. Credit Corp.,* 344 U.S. 218, 221-222 [, 73 S.Ct. 227, 97 L.Ed. 260] (1952) This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle* v. *United States,* 283 U.S. 25, 27 [, 51 St. Ct. 340, 75 L.Ed. 816] (1931) (Holmes, J.) See also *United States* v. *Cardiff,* 344 U.S. 174 [,

73 S.Ct. 189, 97 L.Ed. 200] (1952). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967).

Again referring to this Court's decision in *Bouie* v. *City of Columbia, supra,* this Court stated:

> *There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforseeable and retroactive judicial expansion of narrow and precise statutory language.* As the court recognized in Pierce v. United States, 314 U.S. 306, 62 S.Ct. 237: "*judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.*" Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot "be cured in a given case by a construction in that very case placing valid limits on the statute," for
>
> > the objection of vagueness is twofold: inadequate guidance to the individual whose conduct is regulated and inadequate guidance to the triers of fact. The former objection could not be cured retrospectively by a ruling either of the trial court or the appellate court, though it might be cured for the future by an authoritative judicial gloss. * * * "Freund, The Supreme Court and Civil Liberties, 4 Vand, L.Rev. 533, 541 (1951)."

In *English* v. *Miller,* 341 F.Supp. 714 (1972), the Court, citing this Court's decision in *Connally* v. *General Construction Company,* supra, stated:

> This principle, which governs the constitutionality of alleged vague and overbroad statutes, was articulated by Mr. Justice Sutherland in an opinion of the United States Supreme Court in the case of Connally v. General Const. Co., 269 U.S. 385, 46 S.Ct. 126. *The principle there enunciated expressly states that a crime and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose in advance what course is lawful for him to pursue. The peril of loss of liberty under our constitution may not depend on speculation as to the meaning of a penal statute.* A statute which denies notice of the prohibited conduct because it would be irrational to take such notice is violative of due process of law. See Parker v. Morgan, 322 F.Sup. 585 (N.D.N.C. 1971).

One of the earmarks and vices of vague statutes is that they result in discriminatory enforcement. This arises out of the confusion of construction and interpretation that vague statutes beget. In the instant case we have the anomalous situated created whereby the Petitioner's conviction would be set aside if he lived in the Second Circuit, which has construed the New York commercial bribery statute, Section 180 of the New York Penal Code, as not to be bribery within the meaning of the Travel Act, whereas the Petitioner and all other citizens in the Fourth Circuit are subject to prosecution under the Travel Act, where the New York commercial bribery statute is deemed sufficient to invoke the jurisdiction of the Travel Act. The United States Attorney for the Southern District of New York, in obedience to *United States* v. *Brecht,* supra,

has abandoned all prosecutions of the Travel Act, where the underlying unlawful activity is the commercial bribery statute of New York, Section 180 of the New York Penal Code. Thus, it is Petitioner's contention that even if this court were to adopt the expansive construction announced by the Fourth Circuit in *United States* v. *Piluso,* supra, and reject the more restrictive construction of the statute announced by the United States Court of Appeals for the Second Circuit in *United States* v. *Brecht,* the court would nonetheless be required to set aside the conviction because it lacks due process of law under *Marks* v. *United States,* supra, *Bouie* v. *City of Columbia,* supra, and *McBoyle* v. *United States,* supra

We think the language of this Court in *United States* v. *Cardiff,* 344 U.S. 189, 78 S.Ct. Rep. 189, is directly applicable to the instant petition. The Court stated:

> * * * The alternative construction pressed on us is equally treacherous because it gives conflicting commands. It makes inspection dependent on consent and makes refusal to allow inspection a crime. However we read § 301(f) we think it is not fair warning, cf. United States v. Weitzel, 246 U.S. 533, 38 S.Ct. 381, 62 L.Ed. 872; McBoyle v. United States, 283 U.S. 25, 51 S.Ct. 340, 75 L.Ed. 816, to the factory manager that if he fails to give consent, he is a criminal. The *vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid,* c.v. United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant

> the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. Cf. Herndon v. Lowry, 301 U.S. 242 57 S.Ct. 732, 81 L.Ed. 1066.

While the Petitioner has served what we believe to be an unconstitutional sentence, the matter is not a moot one to the Petitioner. As a citizen he suffers all of the collateral consequences flowing to him as a result of the conviction. This conviction represents the only final conviction that resulted from the prolonged investigation of the Petitioner. He thus has full standing to attack the constitutionality of his conviction. See *Sibron* v. *New York,* 392 U.S. 40 pp. 53-57 (1968); *Street* v. *New York,* 394 U.S. 576 (1969) and *Caragas* v. *La Valle,* 391 U.S. 234 (1968).

In fact, the Petitioner is about to suffer additional loss of rights unless this court resolves this issue. The New York Court of Appeals, recently in the case of *Matter of Chew,* 42 N.Y.2d 490, 398 N.Y.2d 1001 (1977) has announced that all lawyers who are convicted of a federal felony are subjected to automatic disbarment without a hearing. In this conviction, under Title 18, Section 1952, the underlying unlawful activity is two misdemeanors, Section 180 of the New York Penal Code, and Section 215 of Title 18 U.S.C. Therefore, unless this court corrects the unconstitutional judgment that has been entered against the Petitioner, in addition to all the prejudice he has suffered to date, including incarceration, this expansive interpretation of the Travel Act will have escalated two misdemeanors into a federal felony that will result in the automatic disbarment of the Petitioner, without a hearing.

II

The Court Should At This Time Resolve The Continuing Conflict Between The Second Circuit In *United States* v. *Brecht*, Supra, And The Fourth Circuit In *United States* v. *Piluso*, Supra, Not Only Because It Has Resulted In Uneven And Discriminatory Enforcement Of A Major Criminal Act But This Continuing Conflict Has Even Recently Manifested Itself In An Extradition Hearing On The Same Issue In Dispute Between The Second And Fourth Circuits.

The continuing conflict over the property construction of a major criminal statute, Title 18, Section 1952, argues persuasively for the original vote of Mr. Justice when he recorded his vote to grant certiorari, *United States* v. *Piluso*, cert. denied 423 U.S. 874 (1975). In any event, this court has often stated that a denial of certiorari does not imply an expression of agreement with respect to the merits of the case, *United States* v. *Shubert*, 348 U.S. 222, 75 S.Ct. 277.

Of course, it is the Petitioner's contention that the subsequent decision of the United States Court of Appeals for Second Circuit in *United States* v. *Brecht*, supra, is the correct interpretation of the statute and correctly interprets this court's ruling in *United States* v. *Nardello*, supra. Unfortunately the Solicitor General chose not to seek certiorari from the adverse decision in *United States* v. *Brecht*, supra, and so this court, at that time, was denied the opportunity of resolving this continuing conflict. If this Court agreed with the reasoning of the Second Circuit petitioners conviction, the court would have to be set aside and would not have to resolve the first point in this petion.

The language of the United States Court of Appeals for the Second Circuit in *United States* v. *Brecht*,

supra, illustrates the widespread disagreement among appellate panels and district courts as to whether commercial bribery is unlawful activity within the meaning of the Travel Act. The Second Circuit stated:

> The district judges in this circuit have been sharply divided on this issue. See United States v. Niedelman. 356 F.Supp. 979, 981 (S.D.N.Y. 1973) (Knapp, J.). The Fourth Circuit has rejected appellant's contention, United States v. Pomponio, 511 F.2d 953 (4 Cir.), *cert. denied*, 423 U.S. 874 (1975), reversing Judge Bryan who agreed with Judge Knapp. We respectfully disagree with the Fourt Circuit.[3]
>
> As the Supreme Court has noted, ["b]ribery has traditionally focused upon corrupt activities by public officials." United States v. Nardello, 393 U.S. 286, 293 N.11 (1969).
>
> 3. We agree with Judge Albert V. Bryan who had arrested judgment in the Pomponio case and with Judge Whitman Knapp in United States v. Niedelman, supra. As our discussion will show, we draw from United States v. Nardello, 393 U.S. 286 (1969), a conclusion different from the Fourth Circuit

In referring to this Court's decision in *Rewis* v. *United States*, 401 U.S. 808 (1971), the Court stated:

> We must determine whether Congress intended to embrace commercial bribery within the scope of a statute which, as is clear from its legislative history, was enacted for the purpose of punishing interstate travel in aid of racketeering enterprises engaged in by organized crime. As Mr. Justice Marshall stated for a unanimous Court in Rewis v. United States, 401 U.S. 808 (1971), a case which gave a restrictive interpretation to the Travel Act, the "[l]egislative history of the Act is limited

but does reveal that § 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another." 401 U.S. at 811.

The Court in Rewis cautioned that " *an excessive Travel Act would alter sensitive federal state relationships, could overextend limited federal police resources, and . . . would transform relatively minor state offenses into federal felonies.*" 401 U.S. at 812. Later the same year, in United States v. Bass, 404 U.S. 336, 349 (1971), the Court again stressed that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."

To show the extent to which this continuing conflict in the interpretation of the Travel Act has transcended the normal prosecutions under the Travel Act, it has even asserted itself in a recent extradition hearing in *Freedman* v. *United States,* 437 F.Supp. 1252 (1977). In that case the district court was faced with the question as to whether to honor the extradition treaty from Canada for an individual charged under Canadian law with fraud with underpinnings of commercial bribery at the core of the charge. The court went into an extended discussion over the conflict between the Second and Fourth Circuit opinions in *United States* v. *Brecht,* supra, and *United States* v. *Piluso,* as to whether a criminal charge existed under the Travel Act, Title 18, Section 1952.; if so, this would have justified extradition under the treaty with Canada. After an exhaustive discussion of the conflicting interpretations of this court's ruling in *United States* v. *Nardello,* supra, the court concluded not to extradite on this basis because of lack of comparability between the laws of Canada and Georgia vis-a-vis commercial bribery.

The Petitioner did ask the United States Court of Appeals for the Fourth Circuit to certify two questions to this court so that the matter could be finally resolved. These questions are reflected at page — in the statement of the case and in the opinion of the Court of Appeals (Pet. Ap. ——) Court, which again noted this court's prior denials of certiorari.

In the event this court concludes that Section 180 of the New York Penal Code does not constitute unlawful activity within the meaning of the Travel Act but does find that Section 215 of Title 18 could be the basis of jurisdiction under the Travel Act, the court would still be required to set aside the conviction because, under *Leary* v. *United States,* 393 U.S. 631, 89 S.Ct. 532, this court stated:

> It has long been settled that when a case is submitted to a jury on alternative theories the unconstitutionality of any of the theories requires the conviction be set aside. See Stromberg v. California, 283 U.S. 359, 51 S.Ct. 632. See also, Mills v. United States, 164 U.S. 644, 17 S.Ct. 210, Nicola v. United States, 72 F.2d 787 (3rd Cir. 1934). Yates v. United States, 354 U.S. 298, 312 (1957) and United States v. Johns, 444 F.2d 58.

Since a general verdict was returned in this case and it was submitted to the jury on two theories, the unconstitutionality of either of the theories would require the judgment to be set aside. We do submit, however, that it is crystal clear from the legislative history of Title 18, Section 215 USC, that it also cannot constitute the unlawful activity necessary for a prosecution under the Travel Act.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ALBERT J. AHERN, JR.
5205 Leesburg Pike
Bailey's Crossroads, Virginia

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-2581

UNPUBLISHED

UNITED STATES OF AMERICA, *Appellee,*

v.

CHARLES J. PILUSO, *Appellant,*

and

LOUIS J. POMPONIO, JR., PAUL POMPONIO, PETER POMPONIO, *Defendants.*

No. 78-6066

UNITED STATES OF AMERICA, *Appellee,*

v.

LOUIS J. POMPONIO, JR., *Appellant*

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, Senior District Judge.

Argued May 2, 1978 Decided June 28, 1978

Before RUSSELL, Circuit Judge; FIELD; Senior Circuit Judge, and WIDENER, Circuit Judge.

Michael L. Hertzberg; Albert J. Ahern for Appellants; Robert F. McDermott, Jr., Assistant United States Attorney (William B. Cummings, United States Attorney and Frank W. Dunham, Jr., Assistant United States Attorney, on brief) for Appellees.

PER CURIAM:

Louis J. Pomponio, Jr., and Charles J. Piluso have appealed from orders of the district court denying their respective motions filed pursuant to 28 U.S.C. § 2255 to vacate their convictions under the Travel Act, 18 U.S.C. 1952.

The appellants, together with Peter Pomponio and Paul Pomponio, were charged in an indictment with violating and conspiracy to violate the Travel Act. The indictment tracked the language of the statute, charging the defendants with traveling from the State of Virginia to the State of New York with the intent to promote and carry on an unlawful activity. The unlawful activity was specified as the crime of bribery in violation of Section 180 of the New York Penal Code as well as 18 U.S.C. § 215. The defendants filed a motion to dismiss the indictment on the ground that neither the New York statute nor the section of the federal code constituted an "unlawful activity" within the purview of Section 1952. The dismissal motion was denied and the case proceeded to trial against all of the defendants except Louis J. Pomponio, Jr., who had been hospitalized because of illness. Thereafter, the court granted a motion for judgment of acquittal of Peter Pomponio and the jury returned a verdict of not guilty with respect to Paul Pomponio. Charles J. Piluso was found guilty and appealed his conviction to this court. Louis J. Pomponio, Jr., was later brought to trial and found guilty by the jury. The district judge who tried the case, however, granted Pomponio's post-trial motion in arrest of judgment, holding that neither the federal nor the state statute specified in the indictment was an "unlawful activity" under 18 U.S.C. § 1952. The Government appealed this action of the district court.

The appeals were consolidated and by opinion filed on February 7, 1975,[1] Piluso's conviction was affirmed, while the order of the district court granting Pomponio's motion in arrest of judgment was reversed. In the course of our opinion we held that the word "bribery" as used in the Travel Act was broad enough to embrace commercial bribery under Section 180 of the New York Penal Law, but some months later the Second Circuit reached a contrary conclusion in *United States* v. *Brecht*, 540 F.2d 45 (1976). Not unexpectedly, when Louis J. Pomponio, Jr. again came to us upon his direct appeal from his conviction, he urged us to accept the position of the Second Circuit, but we declined to do so, stating that we were willing to "rest upon our prior decision." *United States* v. *Pomponio*, No. 75-2287 (November 19, 1976).

In January of 1977 Pomponio petitioned the Supreme Court for certiorari, contending, *inter alia*, that his case presented a clear and unequivocal conflict between two courts of appeal on the question of statutory construction. Certiorari was denied, 430 U.S. 966 (1977), and rehearing denied, 431 U.S. 934 (1977).

In their post-conviction motions the appellants primarily contend that the conflict between us and the Second Circuit, together with the application of our construction of the statute in 1975 to conduct which occurred in 1970 and 1971, deprived them of due process under *Marks* v. *United States*, 430 U.S. 188 (1977), and *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). In our opinion, however, the mere existence

[1] United States v. Pomponio, 511 F.2d 953, *cert. denied*, 423 U.S. 874 (1975).

of a conflict between two circuits with respect to the construction of a criminal statute is insufficient to bring these cases within the rationale of *Marks* and *Bouie*. Perceiving no merit in the arguments advanced by the appellants, the judgments of the district court are affirmed.[2]

AFFIRMED

---

[2] The appellant Piluso has requested that pursuant to 28 U.S.C. § 1254(3) we certify to the Supreme Court of the United States two questions:

1. Does an indictment charge a valid federal offense under the Travel Act, Title 18, Section 1952, when the unlawful activity upon which the jurisdiction is predicated is commercial bribery under Section 180 of the New York Penal Code?

2. Does an indictment charge a valid federal offense under the Travel Act, Title 18, Section 1952, when the unlawful activity upon which the jurisdiction is predicated is a violation of Title 18, Section 215 of the United States Code?

For the reason, among others, that the Supreme Court has denied certiorari in the direct appeals of both of the appellants, we decline the petition for certification.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-2581

Filed July 21, 1976

UNITED STATES OF AMERICA, *Appellee,*

v.

CHARLES J. PILUSO, *Appellant,*

and

LOUIS J. POMPONIO, JR., PAUL POMPONIO, PETER POMPONIO, *Defendants.*

NO. 78-6066

UNITED STATES OF AMERICA, *Appellee,*

v.

LOUIS J. POMPONIO, JR., *Appellant,*

and

CHARLES J. PILUSO, PAUL POMPONIO, PETER POMPONIO, *Defendants.*

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Upon consideration of the petition for rehearing and/or amplification of the court's opinion filed on behalf of Charles J. Piluso, by counsel.

IT IS ORDERED that the petition for rehearing and/or amplification of the court's opinion filed on behalf of Charles J. Piluso is denied.

Entered at the direction of Judge Field for a panel consisting of Judge Field, Judge Russell and Judge Widener.

FOR THE COURT,

/s/ WILLIAM K. SLATE, II
CLERK

A True Copy, Teste:

William K. Slate, II, Clerk

By EMILY RUEGER
Deputy Clerk

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 78-279

In the Supreme Court of the United States

OCTOBER TERM, 1978

CHARLES J. PILUSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

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In the Supreme Court of the United States

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CHARLES J. PILUSO, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not reported. Its earlier opinion on direct appeal is reported at 511 F.2d 953.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-4a) was entered on June 28, 1978, and a peti-

tion for rehearing (Pet. App. 5a) was denied on July 21, 1971. The petition for a writ of certiorari was filed on August 18, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether travel in interstate commerce with intent to bribe an officer of a federally-insured bank, and bribery of that officer, constitutes a violation of the Travel Act, 18 U.S.C. 1952.

2. Whether the Travel Act is unconstitutionally vague because the court below and the Second Circuit differ as to the interpretation of the term "bribery" appearing in the Act.

STATEMENT

In 1974 petitioner was convicted by a jury in the United States District Court for the Eastern District of Virginia on one count of conspiracy, 18 U.S.C. 371, and two substantive counts of violating the Travel Act, 18 U.S.C. 1952, for travelling from Virginia to New York with the intent to bribe an officer of a federally-insured bank in violation of 18 U.S.C. 215 and New York Penal Law § 180.00 (McKinney 1975). He was sentenced to concurrent terms of two years' imprisonment. The court of appeals affirmed, 511 F.2d 953, and this Court denied certiorari, 423 U.S. 874. The district court thereafter denied petitioner's motion to vacate his conviction pursuant to 28 U.S.C. 2255,[1] and the court of appeals again affirmed (Pet. App. 1a-4a).

The facts are not disputed. Petitioner and his co-defendant Louis Pomponio were in the business of building and operating office and apartment buildings in Northern Virginia and the District of Columbia. Beginning in 1965 and continuing into 1972, their organization obtained construction loans in excess of $93 million through the Royal National Bank in New York City. During this time span, petitioner and Pomponio gave the senior vice-president of the bank, Sidney Zneimer, cash and gifts (including two automobiles) worth more than $320,000. In return for these payments, Zneimer helped them obtain construction loans, authorized advances that were not based upon the approval of bank inspectors, and approved substantial overdrafts on accounts maintained by their organization. Petitioner, an attorney, established a corporation, Real Equity Consultants, to receive the payments for Zneimer and thereby to conceal them (Tr. 280-287, 293, 373-374, 494-496).

ARGUMENT

1. In this collateral attack on his convictions, petitioner contends (Pet. 9-17) that commercial bribery is not an "unlawful activity" prohibited by the Travel Act and asks this Court to grant certiorari to review the purported conflict in interpreting the Act

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[1] Petitioner was on parole at the time this motion was filed. He has now completed his sentence.

between the Fourth Circuit here and the Second Circuit in *United States* v. *Brecht*, 540 F.2d 45 (1976). Petitioner's arguments are essentially the same as those raised in his prior petition for certiorari, which this Court denied (423 U.S. 874) before *Brecht* was decided by the Second Circuit. The purported conflict between the Second and Fourth Circuits was, however, previously raised in this Court by petitioner's co-defendant, Louis Pomponio, and certiorari was again denied (430 U.S. 966). Nothing has happened since the denial of certiorari in *Pomponio* that justifies review at the present time in connection with petitioner's collateral attack on the convictions based on his and Pomponio's bribery activities.

This case does not present a genuine conflict with *United States* v. *Brecht*, *supra*. The reversed conviction in *Brecht* was based solely on the New York commercial bribery statute, which the Second Circuit concluded was not within the term "bribery" used in Section 1952(b). Petitioner's conviction, on the other hand, was also a result of his violations of the federal bribery statute, 18 U.S.C. 215. Under that provision it is a crime for an officer, director, or employee of a federally insured bank, except as provided by law, to receive any "fee, commission, gift, or thing of value" from any person in exchange for procuring or attempting to procure a loan. Zneimer was an officer of a federally insured bank and personally received in his New York office more than $320,000 from petitioner and his co-conspirators.

Zneimer subsequently pleaded guilty to a federal indictment in connection with those payments.

Petitioner and his co-conspirators thus made payments whose receipt by Zniemer violated 18 U.S.C. 215, whether or not the New York commercial bribery law was violated by the payments. By aiding and abetting Zneimer's offense, they were guilty as principals. Travel in interstate commerce to make those payments was thus in every sense travel to "promote, manage, establish, carry on" or to "facilitate the promotion" of bribery "in violation of the laws of * * * the United States."[2] This basis for conviction was not involved in *Brecht*, which refused to apply the Travel Act to a course of conduct that the court regarded as being in the category of "relatively minor state offenses" that would not justify "a substantial extension of federal police resources." 540 F.2d at 49. It thus cannot be said that the Second Circuit would have reversed petitioner's convictions under the Travel Act.

Petitioner's argument that violations of 18 U.S.C. 215 are not covered by the Travel Act (Pet. 21)

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[2] Each count of the indictment charged petitioner with travel with intent to promote bribery in violation of both 18 U.S.C. 215 and New York law. See 511 F.2d 955. The evidence could not reasonably be viewed as showing a violation of the New York statute but not the federal. Either the money paid to Zneimer was an improper payment to procure commercial loans or it was not. The jury found that it was. This case is thus unlike *Leary* v. *United States*, 395 U.S. 6, 31-32 (1969), where different evidence underlay the separate grounds for conviction.

fares no better. Petitioner can draw no support for this contention from *Brecht*, which did not involve Section 215, and petitioner cites no authority for his construction of the statute. Since Congress, by the enactment of Section 215 has prohibited the acceptance of a bribe by an officer of a federally-insured bank, it is most reasonable to conclude that it intended to include such bribes in the Travel Act's proscription of interstate travel to facilitate the promotion of "bribery * * * in violation of the laws * * * of the United States." The term bribery is properly given its "generic" meaning, and is not subject to strict "common law" limitations that would confine it to corrupt conduct involving government officials. See *United States* v. *Nardello*, 393 U.S. 286, 292-296 (1969): "The language of the Travel Act * * * includes private persons as well as public officials." See also *United States* v. *Perrin*, 580 F.2d 730, 733-734 (5th Cir. 1978).

2. Petitioner also argues (Pet. 10-15) that the Travel Act is unconstitutionally vague, relying upon *Brecht's* holding that commercial bribery forbidden by state law is beyond the scope of the Act. Petitioner asserts (Pet. 10) that there was no precedent in 1971 that "remotely suggested" that his conduct could be deemed a violation of the Travel Act. But the literal text of the statute, as noted above, applied directly to petitioner's facilitation of the bribery of an officer of a federally insured bank, and any person engaged in a scheme to corrupt such an officer could be under no illusions as to the innocence of his

conduct. See also *United States* v. *Culbert*, No. 77-142 (March 28, 1978), slip op. 8-9. Moreover, this Court's decision in *United States* v. *Nardello*, *supra*, 393 U.S. at 293-296, confirmed as early as 1969 that the Travel Act would not be given "an unnaturally narrow reading" of the kind that petitioner advocates here.[3] The decision in the *Brecht* case, of course, was not handed down until after petitioner had violated the Travel Act and could not have misled him into thinking that his conduct was beyond federal regulation

3. The gist of petitioner's argument is that the Fourth Circuit's interpretation of the Travel Act was erroneous. There is no warrant for permitting petitioner to continue to litigate this question, which was raised and decided adversely to him on direct appeal, and which this Court declined to review by certiorari. There has been no "change in the law" in the Circuit where petitioner was convicted, as in *Davis* v. *United States*, 417 U.S. 333 (1974); see also *id.* at 361 (Rehnquist, J., dissenting). The differing approach of the Second Circuit to the applica-

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[3] As this Court pointed out in *Rose* v. *Locke*, 423 U.S. 48, 50 (1975): "All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." Had petitioner consulted the law before acting, he surely would have had "fair warning" that his conduct was illegal. *Marks* v. *United States*, 430 U.S. 188 (1977), and *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), do not assist petitioner. Those cases merely disapprove retroactive applications of the law that cannot be forseen at the time of the alleged offense.

tion of the Travel Act to state law offenses has not resulted in a "complete miscarriage of justice" and does not present "exceptional circumstances that justify collateral relief." 417 U.S. at 346-347; see also *Stone* v. *Powell*, 428 U.S. 465, 477 n.10 (1976). Petitioner has already served his sentence, his parole term having expired. The possibility that an attorney who has engaged in a massive and obviously illegal bribery scheme may be subject to disbarment in New York does not constitute a miscarriage of justice necessitating review by this Court in a collateral proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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OCTOBER 1978

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-279

CHARLES J. PILUSO, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF

THERE IS A DIRECT AND UNEQUIVOCAL CONFLICT BETWEEN THE SECOND CIRCUIT IN U.S. v. BRECHT, 540 F.2d 45 AND THE FOURTH CIRCUIT IN U.S. v. PILUSO, 511 F.2d 1953, AND A CONFLICT WITHIN THE FIFTH CIRCUIT IN U.S. v. PERRIN, 580 F.2d 730 (1978) AS TO WHETHER COMMERCIAL BRIBERY CAN RAISE TRAVEL ACT JURISDICTION WHICH SHOULD BE RESOLVED BY THIS COURT AT THIS TIME

In the Opposition filed by the Solicitor General the Government seeks to dilute the sharpness of the conflict between the Fourth Circuit and the Second Circuit in their divergent constructions of the Travel Act by urging that in the instant case the indictment alleged

in addition to commercial bribery, Section 180 of the New York Penal Code, which was common to both *U.S.* v. *Brecht,* supra, and *U.S.* v. *Piluso,* supra, a conflict of interest statute, Title 18, Section 215, which was not before the Second Circuit in *U.S.* v. *Brecht,* supra. At Page 4 of the Opposition to the Petition for Certiorari, it states:

> Petitioner's argument that violations of 18 USC 215 are not covered by the Travel Act (Pet. 21) fares no better. Petitioner can draw no support for this contention from Brecht, which did not involve Section 215, and Petitioner cites no authority for his construction of the statute.

The instant indictment alleged Section 180 of the New York Penal Code, commercial bribery, and Section 215 of Title 18, a conflict of interest statute, as the unlawful activity raising Travel Act jurisdiction.

The instant case is the only reported case where Section 215 of Title 18 was ever postulated as a basis of unlawful activity giving jurisdiction to the Travel Act. Contrary to the argument in the Opposition, Pages 6 and 7, Section 215 of Title 18 is a conflict of interest statute and not a bribery statute. It is included in the U.S. Code under Chapter 11 entitled "Bribery, Graft, and Conflicts of Interest." Section 215 makes unlawful only receipt of commissions or gifts by officers or employees of banks insured by the Federal Deposit Insurance Corporation. Of the twenty-one sections codified in Chapter 11 of Title 18, twelve deal with the giving of things of value to influence the actions of recipients. It is signifiant that of these twelve statutes there are only two in which only the receiving of a commission or gift violates the law. 18 USC, Sections 215 and 217. Of the others, nine proscribe the giving as

well as the receiving. 18 USC, Sections 201, 203, 209-214 and 216, and one (USC, Section 224) makes the giving only unlawful. Section 215 is directed exclusively to benefits which a bank officer "by reason of his peculiar position of * * * influence or trust exacts from another." See *Razette* v. *United States,* 199 F.2d 44 (6th Cir.) cert. denied 344 U.S. 904 (1952). The legislative history of the Federal Reserve Act of 1913, from which 18 USC Section 215 is derived, reveals that this provision was aimed only at the bank officers. "In this section it is sought * * * to end the illegitimate practice whereby officers of national banks have heretofore profited at the expense of borrowers by charging a commission or brokerage for the obtaining of loans." House Report No. 69, Sixty-third Congress, First Session 72 (1913).

Section 215 of Title 18 may be analogized to statutes making extortion illegal. It has never been suggested that the victim of the extortion is guilty of criminal conduct because he has capitulated to the extortionist's demand. It would be inconceivable to suggest that by combining Section 1952 or Section 2 of Title 18 with the extortion statutes of the Federal Government 18 USC 872 891-894 or of the states persons who utilize the facilities of interstate commerce and made payments to extortionists thereby committed crimes against the United States. The legislative history of Title 18, Section 215 shows that it was designed to prohibit officers of federally insured banks from exacting fees or commissions from parties applying for loans, who many times were in great need and, like the individual being extorted, were subject to involuntary payments.

The absence of any judicial authority other than the instant case plus the legislative history of Section 215 of Title 18 establishes that it is not a statute which can invoke the jurisdiction of the Travel Act. *Its presence, therefore, in this indictment is irrelevant to the direct conflict between the Second Circuit in U.S.* v. *Brecht, supra, and the Fourth Circuit in U.S.* v. *Piluso, supra, that commercial bribery under Section 180 of the New York Penal Code is a basis for jurisdiction under the Travel Act.*

The United States Court of Appeals for the Fourth Circuit recognized the sharpness of its conflict with the Second Circuit in the instant case when it stated (Pet. App. 3A):

> In January of 1977 Pomponio petitioned the Supreme Court for certiorari, contending, inter alia, that his case *presented a clear and unequivocal conflict between two courts of appeal on the question of statutory construction.*

At Page 4 of the Opposition the United States urges that nothing has happened since the denial of certiorari in Pomponio, which presented the conflict, that would warrant the Court in granting certiorari at this time. This Court has repeatedly stated that a denial of certiorari at some point in time neither reflects agreement by this court with the lower court and does not even imply an expression of agreement with respect to the merits of the case. *U.S.* v. *Shubert,* 348 U.S. 222, 75 S.Ct. 277.

However, contrary to the Government Opposition at Page 4, matters have not remained static since this Court's denial of certiorari in *U.S.* v. *Pomponio.* The Government refers, in its Opposition at Page 6, to the

recent decision of the Fifth Circuit in *United States* v. *Perrin,* 580 F.2d 730 (5th Cir. 1978). With respect to this decision, the Government quotes from the opinion:

> The language of the Travel Act * * * includes private persons as well as public officials.

The Government failed to state in its Opposition that *Perrin* v. *United States,* supra, was a split decision, with the dissenting Judge Rubin siding with the decision of the United States Court of Appeals for the Second Circuit in *United States* v. *Brecht,* supra, and adopting all of the arguments advanced in the original petition filed in this Court with respect to the construction of the Travel Act. We call to the Court's attention specifically the language of Judge Rubin dissenting in *United States* v. *Perrin,* supra, when he stated:

> One of the classic limitations in the enforcement of criminal law, which is embedded implicitly in the Due Process Clause of the Constitution, is summed up in the phrase. "Nulla poena sine lege" —there should be no punishment without prior statutory mandate. My brethren require four pages of dialectic to determine that the unadorned word "bribery" in the Travel Act provides authority for the punishment by the Federal Government of "commercial bribery." The layman would scarcely choose so uncertain a route to define a clear proscription, nor indeed would the Second Circuit, United States v. Brecht, 2 Cir. 1976, 540 F.2d 45, cert. denied, 1977, 429 U.S. 1123, 97 S.Ct. 1160, 51 L.Ed.2d 573.

The dissenting judge also stated:

> Let me place a few grains on the side of the scale counterbalancing the arguments used by my brethren. As set forth in United States v. Brecht, supra, only 13 states had commercial bribery statutes in

1960, the year before the Travel Act was enacted. United States v. Brecht, supra, 540 F.2d at 48. At least six states, as recently as 1976, did not even mention the word "bribery" in defining the offense now commonly called commercial bribery. Id. at 49 n. 6. In Louisiana, as in New York and most other states that proscribe commercial bribery, the offense prohibited is a misdemeanor. It is punishable in Louisiana by a maximum of imprisonment for six months and a fine of no more than $500, or both. LSA-R.S. 14:73. Because of the majority's holding, the added element of interstate travel escalates commercial bribery to a federal crime, and to a felony punishable by imprisonment for up to five years and a fine of up to $10,000, or both. 18 U.S.C. § 1952(a).

None of these factors is conclusive. Together, however, they weigh enough at least to balance, and, in my opinion, to tilt the scales to the other side. I would not read a criminal statute whose meaning is so ambiguous as justifying the interpretation placed on it by the majority and our colleagues of the Fourth Circuit.

Contrary to the footnote in the Government's Opposition at Page 5, if this court were to hold that either Title 18, Section 180 of the New York Penal Code, or Section 215 of Title 18 did not independently invoke the jurisdiction of the Travel Act, a vacation the judgment would be constitutionally mandated under ***Leary*** **v. *United States* 395 U.S. 6.**[1]

[1] Inasmuch as the indictment inextricably melded both statutes, dismissal would be required if either had been improperly invoked. As Judge Bryan recognized during the trial of Louis Pomponio, we cannot know whether the jury "came back on the right one or the wrong one, so if [any] of those is • • • improper • • •, then the conviction cannot be maintained." Transcript of proceedings in District Court, May 17, 1974. "[T]he proper rule to be applied

In the instant case the Government introduced evidence which sought to portray the witness Zneimer as the reciepient of payments from Ponponio-controlled corporations and that in consideration of same Zneimer approved construction advances in excess of that which the actual construction allegedly would have justified. This evidence was offered to support the underlying unlawful activity of commercial bribery, Section 180 of the New York Penal Code. The jury's general verdict of guilty in this case may have been premised on two distinct theories raised by the evidence. One theory may have been a conclusion that Zneimer was improperly influenced into making judgments adverse to the bank's interests as a result of the payments by the Pomponio corporations. In this instance, the underlying unlawful activity upon which the conviction would have been predicated would have been Section 180 of the New York Penal Code, commercial bribery. Conversely, another interpretation of the jury's verdict could have been premised upon the testimony of Zneimer and others that all his actions were proper insofar as the banks's interests were concerned, but that the underlying unlawful activity of Section 215 of Title 18 was established when the Petitioner, as counsel for the Pomponio corporations, allegedly assisted in the witness Zneimer receiving payments for extensions of credit to the Pomponio corporations.

It is undisputed, therefore, that there are two distinct theories of underlying activity that arose from differing constructions of the evidence as presented,

is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." Yates v. United States, 354 U.S. 298, 312 (1957); United States v. Johns, 444 F.2d 58 (5th Cir. 1971).

and under a general verdict there is no way that one can assess upon which theory the jury returned its verdict. Therefore, unless both Section 180 of the New York Penal Code and Section 215 of Title 18 independently constitute unlawful activity within the meaning of the Travel Act, the judgment in this case must be set aside under *Leary* v. *United States,* 395 U.S. 6, 31-32 (1969).

The Travel Act is a criminal statute of overriding importance and no sound reason can be advanced for not resolving at this time the direct conflict which has emerged among the circuits as to whether commercial bribery can raise Travel Act jurisdiction. Contrary to the statements at Pages 7 and 8 of the brief in opposition, there is a "complete miscarrirge of justice" which does present "exceptional circumstances that justify collateral relief." See *Davis* v. *United States,* 417 U.S. 333 (1974) and this miscarriage of justice is that the Petitioner has served and completed a prison term that was imposed upon him in violation of due process of law, and to additional collateral punishment by the threat of possible disbarment arising from a judgment which has been unconstitutionally obtained and which is the subject of this collateral attack.

The instant petition, therefore, affords this Court the opportunity not only to resolve existing conflicts between the Second and Fourth Circuits and the dispute within the Fifth Circuit but allows this Court to prevent a further miscarriage of Justice which will accrue to this petitioner arising from the unconstitutional judgment that was imposed upon him.

REGARDLESS OF WHICH CONSTRUCTION OF THE TRAVEL ACT IS CORRECT, U.S. v. BRECHT, SUPRA, OR U.S. v. PILUSO, THE PETITIONER'S CONVICTION LACKS DUE PROCESS OF LAW UNDER THIS COURT'S RULING IN MARKS v. UNITED STATES, 430 U.S. 188 (1977); BOUIE v. CITY OF COLUMBIA, 378 U.S. 347, AND DOUGLAS v. BUDER, 412 U.S. 430.

The Government purports to respond to the first point which challenges the Constitutionality of the Travel Act due to vagueness and lack of notice of prohibitive conduct in the Petition for Certiorari, Pages 9-17, at Page 7 of its brief in opposition. The Government at no point in the Opposition attempts to suggest that this Court's rulings in *U.S.* v. *Nardello,* 393 U.S. 286 would have given any notice that Section 215 of Title 18, a conflict of Interest statute, which punishes the receiver and not the payor, would constitute bribery within the meaning of the Travel Act. The absence of any adjudicated cases on this issue, other than the instant one, shows that no one, including the Government, even thought of utilizing Section 215 of Title 18 as a basis for Travel Act jurisdiction.

The dissenting opinion in *United States* v. *Perrin,* supra, at Page 738 clearly points out that commercial bribery was never intended by Congress to be covered by the Travel Act. Judge Rubin stated:

> We cannot truly ascribe to Congress any intention either to include or exclude commercial corruption; Congress did not deal with the problem. As one scholar has said:
>
> > The difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what

> the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.

Judge Rubin pointed out that if the defendants were guilty they could be prosecuted under state law. He wisely counselled against expansive extension of federal jurisdiction when he stated:

> Each of them, if guilty of anything, can be prosecuted under state law. I would leave them and the record of the trial to state authorities; I would leave to Congress the amendment of the statute to make the mesh of the net smalled if it seeks to catch the commercially corrupt in the future.

The underlying unlawful activity in this case, Section 215 of Title 18, and Section 180 of the New York Penal Code, cannot by any fair reading of the Nardello case impute to anyone who might have read the Nardello decision notice that these two rather limited misdemeanors could be utilized as the bribery contemplated by the Travel Act. The expansive judicial construction which the Fourth Circuit has given to the Travel Act has thus denied the Petitioner due process of law, since he was not reasonably put on notice of what could constitute a violation of the Act under all of the cases cited in the Petition for Certiorari, Pages 9-17.

CONCLUSION

This continuing conflict over the jurisdiction of commercial bribery to raise Travel Act jurisdiction should be resolved at this time. The Petitioner should not be subjected to additional collateral punishment while this major issue goes unresolved when the resolution determines whether in fact the Federal Court had jurisdiction to even try the Petitioner. The continuing and ever-expanding conflict in the circuit courts of appeal and among district courts as to whether commercial bribery can raise Travel Act jurisdiction should be resolved by this Court at this time. If in fact no federal jurisdiction is properly raised, while this Court cannot correct the miscarriage of justice which occurred insofar as the serving of the Petitioner's sentence is concerned, it can prevent additional collateral punishment that accrues to him by virtue of this judgment.

Respectfully submitted,

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